87-93

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No._____

VINCENT W. FUSCO and CAROL FUSCO,
Petitioners,

v.

THE STATE OF CONNECTICUT, THE TOWN OF TRUMBULL, THE PLANNING AND ZONING COMMISSION OF THE TOWN OF TRUMBULL,THE ZONING BOARD OF APPEALS OF THE TOWN OF TRUMBULL, DONALD MURRAY, INDIVIDUALLY and AS BUILDING OFFICIAL FOR THE TOWN OF TRUMBULL, FRANK FENNELL and GLORIA FENNELL and ALBERT D'AMATO,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

(1) Does Connecticut's zoning procedure, which provides for notice of zoning hearings by newspaper publication, violate federal due process if interested parties are easily identified and actual notice to them will not burden governmental operations?

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STATUTES

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TO THE HONORABLE, THE CHIEF JUSTICE and ASSOCIATE JUSTICES of the Supreme Court of the United States:

Petitioners, Vincent W. Fusco and Carol Fusco, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Second Circuit entered in this proceeding March 26, 1987.

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit, reported at 815 F.2d 201 (2d Cir. 1987), is reproduced in the Appendix. (18)

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Second Circuit was entered March 26, 1987. A timely petition for rehearing or in the alternative for a rehearing en banc was denied June 4, 1987, and this petition for certiorari was filed within 60 days of that date. Thereafter, sua sponte, the Circuit Court reconsidered the petition for rehearing in light of the recent decision of the United States Supreme Court in First English Evangelical Lutheran Church v. County of Los Angeles, 55 U.S.L.W. 4781 (U.S. June 9, 1987) and by order dated July 2, 1987, adhered to its previous decision.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1)

Petitioners sued to enjoin the defendants from enforcing decisions of the Trumbull Planning and Zoning Commission and the Trumbull Zoning Board of Appeals claiming that Connecticut zoning notice requirements, Conn. Stat. 8-3 (28) and 8-7 (31) deny due process because newspaper publication is unlikely to apprise interested parties of pending zoning applications and more effective methods are available. Jurisdiction was claimed under 28 U.S.C. 1343(c); 42 U.S. C. 1983; 28 U.S.C. 2201; 28 U.S.C. 2202; Federal Rules of Civil Procedure, Rule 57; the United States Constitution, Article III, Section 2.

STATUTORY PROVISIONS INVOLVED

The pertinent Connecticut zoning statutes claimed to be unconstitutional, Conn. Stat. 8-3 and 8-7 are reproduced in the Appendix. (28,31)

STATEMENT OF THE CASE

Petitioners, Carol and Vincent Fusco, live at 470 Shelton Road, Trumbull, Connecticut. Their neighbors, Frank and Gloria Fennell, applied for permission to convert a sideyard into a building lot, creating two parcels, a one acre lot with the existing house, and a building lot, from one. Both homes are in an AA Residential Zone which requires one acre lot area and one hundred fifty feet of road frontage. Because of sideyard and frontage requirements for the existing house, the proposed building lot had eighty four and 29/00 feet of road frontage.

The Trumbull Planning and Zoning Commission approved the subdivision subject to a waiver of the frontage requirement by the Trumbull Zoning Board of Appeals. Pursuant to Conn. Stat. 8-3, (28) notice of the December 19, 1984 hearing on the subdivision application was published in the

Bridgeport Post on December 8, 1984 and December 14, 1984. Pursuant to Conn. Stat. 8-7, (31) notice of the February 6, 1985 Zoning Board of Appeals hearing on the requested variance was published in the Bridgeport Post January 26, 1985 and February 1, 1985.

Petitioners, whose house abuts the proposed building lot, did not see the newspaper notices and did not attend either hearing. In Connecticut, variances of zoning regulations are allowed upon a showing of unusual hardship or exceptional difficulty. Conn. Stat. 8-6(3). (28) The Second Circuit Court of Appeals found the Fennells proved no hardship at the hearing and no hardship was specified in their application.

Sometime in June or July 1985 Mr. Fennell told Mr. Fusco he sold his house and wanted to sell the lot. It was then, long after the fifteen day appeal period expired,

Conn. Stat 8-8, (35) Mr. Fusco learned of the subdivision and variance.

REASONS FOR GRANTING THE WRIT

1. The Decision below conflicts with Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983)

Petitioners rely on Mennonite Board of Missions v. Adams, 462 U.S. 791 (1982) which invalidated Indiana's tax foreclosure procedure. Petitioners see their situation as analagous, but District and Circuit Court distinguished Mennonite for different reasons. The District Court held petitioners had no protected property interest because the Fennell variance (the state action) did not directly affect them. The District court assumed the variance diminished the value of the Fusco property and destroyed privacy on that boundary. The Circuit Court disagreed. It decided petitioners' allegations were "not so insubstantial as to fail to provide an occasion for the District Court's exercise

of subject matter jurisdiction; [they] simply failed to state a claim on which relief could be granted..." (24) The Circuit Court distinguished Mennonite because the Indiana tax statute worked a "complete nullification" of the mortgagee's unquestioned property interest upon his failure to redeem within the stuatutory period.(27)

It is submitted the Circuit Court confused "notice" with "taking". (e.g. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, ___U.S.___, June 9, 1987) Petitioners claim that as interested parties they were entitled to actual notice of zoning hearings that might change permitted uses of property next door. Conn. Stat. 8-8. (36) In Mennonite the mortgagee's damage was also incidental to state action directed at another's property, in that case, the mortgagor's fee. Since the debt remained,

the "taking" was incomplete, but it stretches credulity to believe Mennonite's result would be different had the tax sale resulted in monies that made the loss less than total. Parratt v. Taylor, 451 U.S. 527 (1981) overruled in part on other grounds, Daniels v. Williams, ___U.S.___, 106 S. Ct 662 (1986) involved a twenty five dollar hobby kit, but amount was never an issue. Petitioners were prepared to prove damage to the market value of their property exceeded ten thousand dollars. Petitioners were also prepared to prove names and addresses of abutting owners, the interested parties, were available at the tax assessor's office, although the Fennells, having lived in the neighborhood eleven years, knew everyone within one hundred feet. Even if the identities of abutting property owners were not readily available, requiring zoning applicants to walk the neighborhood is no more onerous a burden than the duty of

searching titles imposed on tax collectors by Mennonite. If constructive notice did not pass constitutional muster in Mennonite, it should not pass it here.

2. This case can clarify an important area of constitutional law by declaring constructive notice never satisfies due process when interested parties are easily identified and requiring actual notice does not burden government operations.

Mennonite mandates actual notice to interested parties when government operations are not burdened. It did not weigh procedure against substance. It simply held:

"...Notice by mail or other means as certain to ensure actual notice is a minimum constitutional pre-condition to a proceeding which will adversly affect the liberty or property interest of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable..."

Mennonite at p. 800

In Board of Regents v. Roth, 408 U.S. 564 (1972), liberty and property interests were defined as as broad, majestic terms left to gather meaning from experience, but

by any definition, petitioners were interested in zoning hearings that might allow a house next door. The Connecticut legislature recognized that interest by giving abutting land owners (within 100 feet) a right to appeal zoning decisions without proving "aggrievement". Conn. Stat. 8-8(a). (35) Aggrievement in Connecticut is synonymous with "standing", there being a legitimate judicial interest in restricting the number of people who can complain of government activity. Warth v. Seldin, 422 U.S. 490,498 (1975)

The Circuit Court found a "...legitimate question whether failure of Conn. Gen. Stat. 8-3,-7 to require actual notice of a pending zoning hearing may be said to cause the loss of a 8-8(a) appeal by an abutting landowner who is otherwise unaware of its pendency..." It suggested petitioners should have complained of the failure to provide notice of the decision,

since appeals are taken from decisions, not hearings, but Connecticut zoning appellants are bound by the record created at the hearing. Havurah v. Norfolk Zoning Board of Appeals, 177 Conn. 440, 444, 418 A.2d 82 (1979). To recognize a right to appeal, but not a right to attend the hearing from which you have a right to appeal is sophistry.

The Circuit Court then characterized petitioners' claims as procedural rather than substantive, citing its decision in BAM Historic District Association v. Koch, 723 F.2d 233 (2d Cir. 1983). In BAM, plaintiffs attempted to stop the establishment of a shelter for homeless men. They claimed diminution of property values and the quality of community life. They also claimed the Uniform Land Use Review Procedure (ULURP) required a hearing before a shelter could be established. The Circuit Court held ULURP did not apply, but if it did, it was procedural in that the City's authority

to establish shelters did not depend on any hearing. The Circuit Court recognized a

"...Due process clause liberty interest may be grounded in State Law that places substantive limits on the authority of state officials, no comparable entitlement can derive from a statute that merely establishes procedural requirements. Cofone v. Manson, 594 F.2d 934, 938 (2d Cir. 1979)"

BAM, supra, at p. 236.

The distinction between procedure and substance is germane because state-created substantive rights cannot be abrogated without due process. Wolff v. McDonnell, 418 U.S. 539 (1974). Wolff reversed an inmate's loss of good time finding:

"[A] person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government, Dent v. West Virginia, 129 U.S. 114, 123 (1889). Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed."

Wolff at p. 558.

State action (reducing good time)

required a preliminary finding of serious misconduct. cf. Olin v. Wakinekona, 461 U.S. 238 (1983), a prison transfer case where the transfer occurred without a preliminary hearing. This Court held the right to remain in a particular prison is not a protected liberty interest absent state substantive intervention.

"...The Court of Appeals thus erred in attributing significance to the fact that the prison regulations require a particular kind of hearing before the Administrator can exercise his unfettered discretion..." (emphasis added)

Olin at p. 250

If Connecticut can constitutionally grant its zoning boards of appeals unfettered discretion, it has not done so. The legislature, acknowledging a need to balance strict adherence with zoning regulations against a community interest in enforcing zoning regulations, established Zoning Boards of Appeals to vary zoning regulations if they find strict enforcement results in hardship or exceptional

difficulty. Conn. Gen. Stat. 8-6(3). (29) Without the finding, they are powerless. East Lake v. Forest City Enterprises, 426 U.S. 668, 674 (note 8) (1975); Stapleton v. Zoning Board of Appeals, 149 Conn. 706, 183 A.2d 750 (1962); Talmadge v. Board of Zoning Appeals, 141 Conn. 639, 109 A.2d 253 (1954);Devaney v. Zoning Board of Appeals, 132 Conn. 537, 542, 45 A.2d 828 (1946). This prerequisite mandates hearings at which interested parties litigate the underlying fact required for state action. Since the Fennells offered no proof of hardship or exceptional difficulty, petitioners would have defeated the variance had they attended the hearing. The requisite jurisdictional finding distinguishes this case from BAM where no statute restricted the City's discretion to establish shelters for the homeless.

Connecticut's zoning scheme envisions an adversarial process, reviewable by courts

on appeal. Public hearings are required at which "...parties in interest and citizens shall have an opportunity to be heard..." Conn. Stat. 8-3 (28) and zoning boards of appeals must "...when a variance is granted, describe specifically the exceptional difficulty or unusual hardship on which its decision is based..." Conn. Stat. 8-7 (31), something the legislature would not require if decisions were not subject to review. To provide an adversarial process, but not require effective notice to an adversary is the quintessential due process violation. Pennoyer v. Neff, 95 U.S. 714 (1877)

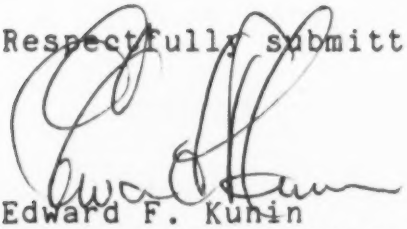
Petitioners' complaint specifies several property interests, each deserving federal protection. They claim the value of their house will be diminished by crowding a house between their house and the existing Fennell house. The privacy of their pool area will be invaded, but most important, they lost their statutory right to be heard,

the most important right of all. If petitioners were alone in their injury, their claim might not merit federal attention, but they attack every statutory scheme where constructive notice deprives interested parties of their rights. The mortgage in Mennonite was eight thousand dollars, but the decision eliminated due process violations in subsequent Indiana tax sales. Petitioners ask this Court to review the way Connecticut conducts its zoning business and redress not only their injury, but potential injuries to other citizens of the state and nation.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1503—August Term, 1985

(Argued: July 18, 1986 Decided: March 26, 1987)

Docket No. 86-7075

VINCENT W. FUSCO and CAROL M. FUSCO,
Plaintiffs-Appellants,

— against —

THE STATE OF CONNECTICUT, THE TOWN OF TRUMBULL, THE PLANNING AND ZONING COMMISSION OF THE TOWN OF TRUMBULL, THE ZONING BOARD OF APPEALS OF THE TOWN OF TRUMBULL, DONALD MURRAY, INDIVIDUALLY and AS BUILDING OFFICIAL FOR THE TOWN OF TRUMBULL , FRANK FENNELL and GLORIA FENNELL and ALBERT A. D'AMATO,
Defendants-Appellees.

Before:

WINTER and MAHONEY, *Circuit Judges*, and ZAMPANO, *District Judge.**

Appeal from a judgment of the United States District Court for the District of Connecticut, T. F. Gilroy Daly, *Chief Judge*, dismissing plaintiffs' complaint.

Affirmed.

EDWARD F. KUNIN, Bridgeport, Connecticut, *for Plaintiffs-Appellants.*

LAWRENCE A. OUELLETTE, JR., Bridgeport, Connecticut (McNamara and Kenney, Bridgeport, Connecticut, of counsel), *for Defendants-Appellees Frank Fennell and Gloria Fennell.*

RALPH L. PALMESI, Trumbull, Connecticut (Palmesi, Kaufman, Portanova & Goldstein, Trumbull, Connecticut, of counsel), *for Defendants-Appellees Town of Trumbull, Trumbull Planning & Zoning Commission, Zoning Board of Appeals of the Town of Trumbull, and Donald Murray.*

*The Honorable Robert C. Zampano, Senior District Judge of the United States District Court for the District of Connecticut, sitting by designation.

KEVIN F. COLLINS, Easton, Connecticut, *for Defendant-Appellee Albert A. D'Amato.*

MAHONEY, *Circuit Judge*:

This is an appeal from a judgment of the United States District Court for the District of Connecticut granting defendants' oral motion to dismiss the complaint in a lawsuit brought pursuant to 42 U.S.C. § 1983 (1982) in which plaintiffs sought declaratory and injunctive relief to redress alleged violations of their rights under the fourteenth amendment. We affirm.

BACKGROUND

Since the court below dismissed the complaint at the conclusion of a hearing on plaintiffs' motion for a preliminary injunction, at which no evidence was introduced, we accept the allegations of the complaint as true for purposes of this appeal, *Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.*, 106 S. Ct. 1922, 1924 & n.2 (1986) (citing cases), and construe them favorably to plaintiffs, *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

The complaint alleges that at all relevant times, plaintiffs have been the owners and occupiers of a parcel of land improved with a home located at 470 Shelton Road in Trumbull, Connecticut. Frank and Gloria Fennell, immediately adjacent neighbors of the plaintiffs, applied to the Trumbull Planning and Zoning Commission ("PZC") for permission to divide their property into two building lots, one of which would be the site of the Fennells' existing home and the other of which, bordering on plaintiffs' property, would be available for sale.

The PZC published notices of its pending hearing on the Fennells' application in the *Bridgeport Post* on December 8 and 14, 1984. These notices were concededly in accordance with the requirements of Conn. Gen. Stat. § 8-3 (1987).[1] Plaintiffs did not attend the hearing before the PZC, since they never saw the notices in the *Bridgeport Post*; they allege that had they known of the hearing, they would have appeared and opposed the Fennells' application.

The Fennells' property is Located in an "AA" residential zone; Trumbull zoning regulations require lots in such areas to have a minimum road frontage of 150 feet. As the Fennells' proposed lot division would have created a building lot which failed to conform to the minimum road frontage requirement, the PZC granted the application conditioned on the approval of a variance from the zoning regulations by the Trumbull Zoning Board of Appeals ("ZBA").

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[1]In pertinent part, Conn. Gen. Stat. § 8-3(a) provides that the

> [PZC] shall provide for the manner in which regulations under section 8-2 and the boundaries of zoning districts shall be respectively established or changed. No such regulation or boundary shall become effective or be established or changed until after a public hearing in relation thereto, held by a majority of the members of the zoning commission or a committee thereof appointed for that purpose consisting of at least five members, at which parties in interest and citizens shall have an opportunity to be heard. Notice of the time and place of such hearing shall be published in the form of a legal advertisement appearing in a newspaper having a substantial circulation in such municipality at least twice at intervals of not less than two days, the first not more than fifteen days nor less than ten days, and the last not less than two days, before such hearing, and a copy of such proposed regulation or boundary shall be filed in the office of the town, city or borough clerk, as the case may be, in such municipality, but, in the case of a district, in the offices of both the district clerk and the town clerk of the town in which such district is located, for public inspection at least ten days before such hearing, and may be published in full in such paper.

Pursuant to Conn. Gen. Stat. § 8-7 (1987),[2] the ZBA published notices of its hearing on the Fennells' application in the *Bridgeport Post* on January 26 and February 1, 1985. The hearing was held on February 6, 1985. The application required a specification of the "exceptional difficulty" or "unusual hardship" necessitating the request for a variance, but the Fennells specified none. *See* Appendix at 16. Nor was an inquiry as to hardship made at the hearing before the ZBA. *See* Addendum to Appellants' Brief at 36-38. As with the earlier hearing before the PZC, the plaintiffs failed to appear at the February 6 hearing, having missed the notices published in the *Bridgeport Post*.

The Fuscos allege that the Trumbull ZBA customarily requires the posting of property for which a zoning variance is sought. They claim that the Fennells failed to post

[2]Conn. Gen. Stat. § 8-7 provides in pertinent part that:

> [n]otice of the time and place of [a hearing before a municipality's ZBA] shall be published in a newspaper having a substantial circulation in such municipality at least twice at intervals of not less than two days, the first not more than fifteen days, nor less than ten days, and the last not less than two days before such hearing. At such hearing any party may appear in person and may be represented by agent or by attorney.... Whenever a zoning board of appeals grants or denies any special exception or variance in the zoning regulations applicable to any property or sustains or reverses wholly or partly any order, requirement or decision appealed from, it shall state upon its records the reason for its decision and the zoning bylaw, ordinance or regulation which is varied in its application or to which an exception is granted and, when a variance is granted, describe specifically the exceptional difficulty or unusual hardship on which its decision is based. Notice of the decision of the board shall be published in a newspaper having a substantial circulation in the municipality and addressed by certified mail to any person who appeals to the board, by its secretary or clerk, under his signature in any written, printed, typewritten or stamped form, within fifteen days after such decision has been rendered.

their property with a notice announcing the hearing before the ZBA.

Thereafter, the Fennells contracted to convey the newly created building lot to defendant Albert A. D'Amato. D'Amato planned to build a house on the lot in such a location as would, according to plaintiffs, destroy their privacy and diminish the value of their property. D'Amato applied to the ZBA for a variance on the sideyard requirement of local regulations. Plaintiffs learned of D'Amato's pending application, since his property had been posted. They appeared before the ZBA and opposed D'Amato's application, which was denied. Nevertheless, according to plaintiffs, D'Amato has stated his intention to build a smaller home, which will require no sideyard variance, very close to plaintiffs' swimming pool.

The Fuscos commenced the instant suit under 42 U.S.C. § 1983 (1982). Asserting a deprivation of property without due process of law, they sought, *inter alia*, a declaration that Conn. Gen. Stat. §§ 8-3, -7 are unconstitutional as they do not require actual notice of hearings pending before zoning commissions or zoning boards of appeal to parties who are statutorily aggrieved within the meaning of Conn. Gen. Stat. § 8-8(a) (1987);[3] and a pre-

[3]Conn. Gen. Stat. § 8-8(a) states that:

> [a]ny person or persons severally or jointly aggrieved by any decision of said board, or any person owning land which abuts or is within a radius of one hundred feet of any portion of the land involved in any decision of said board, or any officer, department, board or bureau of any municipality, charged with the enforcement of any order, requirement or decision of said board, may, within fifteen days from the date when notice of such decision was published in a newspaper pursuant to the provisions of section 8-3 or 8-7, as the case may be, take an appeal to the superior court for the judicial district in which such municipality is located, which appeal shall be made returnable to said court in the same manner as that prescribed for civil actions brought to said court.

liminary injunction restraining defendants (save the State of Connecticut) from effectuating the subdivision and variance obtained by the Fennells and from issuing a building permit allowing construction of a house on the lot D'Amato agreed to purchase.

At the hearing on plaintiffs motion for injunctive relief *pendente lite*, defendants moved to dismiss the complaint. The district court heard from both sides, denied the injunction.and granted defendants' motion to dismiss. This appeal followed.

DISCUSSION

In our view, the district court properly dismissed the complaint for failure to state a claim on which relief could be granted.[4]

Section 8-8(a) thus provides two classes of persons with a right to appeal ZBA decisions to the Connecticut courts. The first class is composed of "aggrieved" persons, who must demonstrate (1) a specific, personal and legal interest in the substance of the agency's decision, and (2) that this interest has been specially and adversely affected thereby. *Walls v. Planning and Zoning Commission*, 176 Conn. 475, 477-78 (1979). Such persons are considered "classically aggrieved." *See Pierce v. Zoning Board of Appeals*, 7 Conn. App. 632, 636 (1986). The second class is comprised of persons "owning land which abuts or is within a radius of one hundred feet of any portion of the land involved in any decision of" the agency. Conn. Gen. Stat, § 8-8(a). Such persons are "statutorily aggrieved," *see Pierce*, 7 Conn. App. at 636; they are deemed to have standing to appeal to the Connecticut courts without proof of aggrievement "independent of their status as abutters." *Nick v. Planning and Zoning Commission*, 6 Conn. App. 110, 112 (1986).

[4]It is not clear from the record whether the district court dismissed the complaint for want of subject matter jurisdiction or for failure to state a claim on which relief could be granted. The record reveals the following pertinent dialogue between plaintiffs' counsel and the district court.

Our analysis is guided by *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds, Daniels v. Williams*, _ U.S. _, 106 S. Ct. 662 (1986), wherein the Supreme Court stated that

> in any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States.

Parratt, 451 U.S. at 535. Where, as here, a party claims a deprivation of property without due process in violation of the fourteenth amendment, the second *Parratt* element embraces the following inquiry: (a) whether a property

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THE COURT:	[T]he motion for preliminary injunction is denied. The case is hereby dismissed in light of the failure to provide this Court with some jurisdictional basis to hear the claim. Thank you all.
MR. KUNIN:	Excuse me, your Honor. Can I present some evidence?
THE COURT:	No. The case is dismissed. I have no jurisdiction.
MR. KUNIN:	Well, I would like to appeal.
THE COURT:	Judgment will enter today. And if that's an appealable ruling, it can be appealed.
MR. KUNIN:	Well—but I haven't presented any evidence.
THE COURT:	I'm dismissing the complaint for failure to set forth a cause of action, assuming the pleadings in it to be accurate.

Here, as in *BAM Historic District Association v. Koch*, 723 F.2d 233 (2d Cir. 1983), we believe that plaintiffs' allegations were "not so insubstantial as to fail to provide an occasion for the District Court's exercise of subject matter jurisdiction; [they] simply failed to state a claim on which relief could be granted . . . ." *Id.* at 237 (citation omitted). Accordingly, our disposition of this case is based on the latter ground of dismissal.

right has been identified; (b) whether governmental action with respect to that property right amounts to a deprivation; and (c) whether the deprivation, if one be found, was visited upon the plaintiff without due process of law. *See id.* at 536-37.

As to the first *Parratt* element, we note that it is far from clear how the Fennells and D'Amato may be charged with acting under color of state law so as to be amenable to suit under § 1983. This issue was not aired in the district court, nor was it briefed on appeal. Nevertheless, we will assume each defendant was clothed with the requisite state authority, in light of the fact that plaintiffs have failed to allege facts—nor could they—sufficient to satisfy the second *Parratt* element.

At the oral argument on plaintiffs' motion for a preliminary injunction, the Fuscos were pressed to identify the property rights allegedly deprived by defendants. First, they asserted a property interest in Conn. Gen. Stat. § 8-8(a), which grants statutorily and classically aggrieved persons a right to appeal zoning decisions to the Connecticut courts. They claimed this right was deprived without due process by operation of Conn. Gen. Stat. §§ 8-3, -7, which did not require the relevant authorities to actually notify plaintiffs of the Fennells' pending subdivision application. In other words, as the Fuscos were unaware of the subdivision hearing, there was no way they could comply with the time constraints on taking appeals provided by § 8-8(a); therefore, they were deprived of their right to appeal due to the failure of defendants to provide them with actual notice of the hearing.[5] Second, the Fus-

[5]Conn. Gen. Stat. § 8-8(a) requires that an appeal be taken from the zoning agency to the Connecticut Superior Court within fifteen days of the date the agency publishes notice of its decision. It is the published notice

cos argued that if defendants were not restrained, the value of plaintiffs' real estate would be diminished, and they would be injured in the enjoyment of their home and surrounding land.

We must reject plaintiffs' contentions. The opportunity granted abutting landowners and aggrieved persons to appeal decisions of planning and zoning commissions and zoning boards of appeal is purely procedural and does not give rise to an independent interest protected by the fourteenth amendment. *BAM Historic District Association v. Koch*, 723 F.2d 233, 236-37 (2d Cir. 1983); *see also Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 58 (2d Cir. 1985).[6] Plaintiffs second claim—that the value of their

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of the agency's *decision* which triggers the appeal right of § 8-8(a). *See Bridgeport Bowl-O-Rama, Inc. v. Zoning Board of Appeals*, 195 Conn. 276, 280 & n.5 (1985). Therefore, there is a legitimate question whether failure of Conn. Gen. Stat. §§ 8-3, -7 to require actual notice of a pending zoning *hearing* may be said to cause the loss of a § 8-8(a) appeal by an abutting landowner who is otherwise unaware of its pendency. As the right to appeal does not accrue until adequate notice of a zoning body's *decision* is published, it would seem that a failure to discover the published decision is more directly related to loss of the appeal right. Curiously, plaintiffs have alleged their unawareness of the hearings before the Trumbull PZC and ZBA, but have said nothing regarding the notice of the ZBA's decision on the Fennells' variance. It is reasonable to assume, however, that where, as here, abutting landowners fail to see published notices of hearings pending before local zoning agencies, failure of §§ 8-3, -7 to require actual notice to such parties is causally related to a claimed loss of § 8-8(a)'s appeal right, since a person unaware of a hearing will not be on the lookout for the ultimate decision resulting from the hearing.

[6]We note that Chief Judge Daly placed considerable reliance, in his dismissal of the Fuscos' complaint, upon *Sullivan v. Town of Salem*, No. H 81-879 (D. Conn. Dec. 13, 1985), which was reversed and remanded in part by this court, 805 F.2d 81 (2d Cir. 1986). That reversal, however, was premised upon finding an entitlement under Connecticut law to the issuance of a certificate of occupancy which constituted "property" within the meaning of 42 U.S.C. § 1983; there is no similar entitlement here.

real property will decline absent relief—fares no better. Assuming the truth of the claim, the Fuscos have failed to allege a *deprivation* cognizable under the fourteenth amendment. As we held in *BAM Historic District, supra,* "[g]overnmental action [allegedly causing a decline in property values] has never been held to 'deprive' a person of property within the meaning of the Fourteenth Amendment." *Id.* at 237.

Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), on which plaintiffs place reliance, is distinguishable. There, a mortgagee's secured interest in real property was extinguished by the operation of an Indiana statute which required only constructive notice to mortgagees of impending tax foreclosure sales. Under those facts, particularly where the challenged statute worked a "complete nullification" of the mortgagee's unquestioned property interest upon his failure to redeem the affected real property within the statutory period, the Supreme Court held mortgagees entitled to "notice reasonably calculated to apprise [them] of . . . pending tax sale[s]." *Id.* at 798. The Fuscos do not claim, however, nor could they, that "their property has been taken or their use of it so drastically regulated as to destroy its value. . . ." *BAM Historic District,* 723 F.2d at 237 (citations omitted).

CONCLUSION

For the foregoing reasons, we conclude that plaintiffs have failed to state a claim upon which relief can be granted. Accordingly, the judgment of the district court is affirmed.

Conn. Stat. Sec. 8-3. Establishment and changing of zoning regulations and districts. Enforcement of regulations. Certification of building permits and certificates of occupancy site plans

(a) Such zoning commissions shall provide for the manner in which regulations under section 8-2 and the boundaries of zoning districts shall be respectively established or changed. No such regulation or boundary shall become effective or be established or changed until after a public hearing in relation thereto, held by a majority of the members of the zoning commission or a committee thereof appointed for that purpose consisting of at least five members, at which parties in interest and citizens shall have an opportunity to be heard. Notice of the time and place of such hearing shall be published in the form of a legal advertisement appearing in a newspaper having a substantial circulation in such municipality at least twice at intervals of not less than two days, the first not more

than fifteen days nor less than ten days, and the last not less than two days, before such hearing, and a copy of such proposed regulation or boundary shall be filed in the office of the town, city or borough clerk, as the case may be, in such municipality, but, in the case of a district, in the offices of both the district clerk and the town clerk of the town in which such district is located, for public inspection at least ten days before such hearing, and may be published in full in such paper. The commission may require a filing fee to be deposited with the commission to defray the cost of publication of the notice required for a hearing.

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Conn. Stat. Sec. 8-6. Powers and duties of board of appeals

The zoning board of appeals shall have the following powers and duties: (1) To hear and decide appeals where it is alleged that there is an error in any order, requirement

or decision made by the official charged with the enforcement of this chapter or any bylaw, ordinance or regulation adopted under the provisions of this chapter; (2) to hear and decide all matters including special exceptions upon which it is required to pass by the specific terms of the zoning bylaw, ordinance or regulation; and (3) to determine and vary the application of the zoning bylaws, ordinances or regulations in harmony with their general purpose and intent and with due consideration for conserving the public health safety, convenience, welfare and property values solely with respect to a parcel of land where, owing to conditions especially affecting such parcel but not affecting generally the district in which it is situated, a literal enforcement of such bylaws, ordinances or regulations would result in exceptional difficulty or unusual hardship so that substantial justice will be

done and the public safety and welfare secured, provided that the zoning regulations may specify the extent to which uses shall not be permitted by variance in districts in which such uses are not otherwise allowed. No such board shall be required to hear any application for the same variance or substanitally the same variance for a period of six months after a decision by the board or by a court on an earlier such application.

Conn. Stat. Sec. 8-7. Appeals to board. Hearings. Effective date of exceptions or variances; filing requirements

The concurring vote of four members of the zoning board of appeals shall be necessary to reverse any order, requirement or decision of the official charged with the enforcement of the zoning regulations or to decide in favor of the applicant any matter upon which it is required to pass under any bylaw, ordinance, rule or regulation or to

vary the application of the zoning bylaw, ordinance, rule or regulation. An apeal may be taken to the zoning board of appeals by any person aggrieved or by any officer, department, board or bureau of any municipality aggrieved and shall be taken within such time as is prescribed by a rule adopted by said board, or, if no such rule is adopted by the board, within thirty days, by filing with the zoning commission or the officer from whom the appeal has been taken and with said board a notice of appeal specifying the grounds thereof. The officer from whom the appeal has been taken shall forthwith transmit to said board all the papers constituting the record upon which the action appealed from was taken. An appeal shall not stay any such order, requirement or decision which prohibits further construction or expansion of a use in violation of such zoning regulations except to such extent that the board grants

a stay thereof. An appeal from any other order, requirement or decision shall stay all proceedings in the action appealed from unless the zoning commission or the officer from whom the appeal has been taken certifies to the zoning board of appeals after the notice of appeal has been filed that by reason of facts stated in the certificate a stay would cause imminent peril to life or property, in which case proceedings shall not be stayed, except by a restraining order which may be granted by a court of record on application, on notice to the zoning commission or the officer from whom the appeal has been taken and on due cause shown. Said board shall, within the period of time permitted under section 8-7d, hear such appeal and give due notice thereof to the parties. Notice of the time and place of such hearing shall be published in a newspaper having a substantial circulation in such municipality at least twice at

intervals of not less than two days, the first not more than fifteen days, nor less than ten days, and the last not less than two days before such hearing. At such hearing any party may appear in person and may be represented by agent or attorney. Said board may reverse or affirm wholly or partly or may modify any order, requirement or decision appealed from and shall make such order, requirement or decision as in its opinion should be made in the premises and shall have all the powers of the officer from whom the appeal has been taken but only in accordance with the provisions of this section. Whenever a zoning board of appeals grants or denies any special exception or variance in the zoning regulations applicable to any property or sustains or reverses wholly or partly any order, requirement or decision appealed from, it shall state upon its records the reason for its decision and the zoning bylaw, ordinance

or regulation which is varied in its application or to which which an exception is granted and, when a variance is granted, describe specifically the exceptional difficulty or unusual hardship on which its decision is based. Notice of the decision of the board shall be published in a newspaper having a substantial circulation in the municipality and addressed by certified mail to any person who appeals to the board, by its secretary or clerk, under his signature in any written, printed, typewritten or stamped form, with fifteen days after such decision has been rendered. Such exception or variance shall become effective upon the filing of a copy thereof (1) in the office of the town, city or borough clerk, as the case may be, but, in the case of a district, in the offices of both the distrit clerk and the town clerk of the town in which such district is located and (2) in the land records of the town in

which the affected premises are located, in accordance with the provisions of section 8-3d.

Conn. Stat. Sec. 8-8. Appeal from board to court. Review by appellate court

(a) Any person or persons severally or jointly aggrieved by any decision of said board, or any person owning land which abuts or is within a radius of one hundred feet of any portion of the land involved in any decision of said board, or any officer, department, board or bureau of any municipality, charged with the enforcement of any order, requirement or decision of said board, may, within fifteen days from the date when notice of such decision was published in a newspaper pursuant to the provisions of section 8-3 or 8-7, as the case may be, taken (sic) an appeal to the superior court for the judicial district in which such municipality is located, which appeal shall be made returnable to said

court in the same manner as that prescribed for civil actions brought to said court.

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